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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO RAY OWSLEY,

Defendant and Appellant.

D052674

(Super. Ct. No. SCE264799)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

Antonio Owsley appeals from a judgment convicting him of mayhem and assault by means of force likely to produce great bodily injury. He contends the judgment must be reversed because the trial court erred in admitting a statement under the coconspirator exception to the hearsay rule. We reject his argument and affirm.

Overview

Around 12:45 a.m. on September 5, 2006, Gilbert Tapia and James Deeds were injured in a fight in front of a convenience store. The persons involved in the fight included Owsley, Keith Coatsworth, Enrique Perez, and Emmanuel Head. Owsley, Coatsworth and Perez were charged in the incident.¹ The cases against Coatsworth and Perez were resolved prior to trial. Owsley was convicted after a jury trial.

Owsley contends that a statement made by Perez did not qualify for admission under the coconspirator exception to the hearsay rule and should not have been admitted. The challenged evidence consists of Perez's statement to an employee of the convenience store indicating that Perez and others were going to assault some people from a nearby bar. Owsley contends the record does not show that the statement was made in furtherance of the conspiracy, a foundational requirement to apply the hearsay exception. We hold there are sufficient facts to support this preliminary fact, and accordingly the trial court did not abuse its discretion in admitting the statement.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of the incident, victims Deeds and Tapia were at a bar located near the convenience store where the fight took place. Patrons of the bar would frequently go to the store to make purchases and then return to the bar.

Coatsworth lived at a trailer park that was located in the same area as the bar and the store. Coatsworth, Owsley, Perez, and Head frequently "hung out" together in front

¹ Head was detained in another state on other charges.

of the trailer park. Dante Alvarado lived at the trailer park and worked at the store. Alvarado was friends with Coatsworth and was acquainted with Owsley, Perez, and Head.

Shortly before midnight on September 4, when Alvarado was leaving the trailer park on his way to work, he saw Owsley, Coatsworth, and Head together in front of the trailer park. When Alvarado neared the store, he saw Perez. Perez stated to Alvarado, "We're going to roll some fools from [the bar]." Alvarado interpreted this statement to mean that they were going to "[b]eat some guys up, jump some guys."

Tapia left the bar to go to the store shortly before 12:45 a.m. on September 5. About five minutes later, Deeds also left the bar to go to the store. Deeds testified that while he was walking to the store, he heard Owsley and another male near the trailer park saying something like "'you motherfucker'" or "'bitch.'" Thinking that they were directing these comments at him, Deeds stopped and asked them what they said. Owsley and the other male responded with something unpleasant. One of them whistled or made a "hoot call," and then three additional males (one of whom was Coatsworth) came running from the trailer park. The group of males yelled and screamed and chased after Deeds.

Deeds went into the store and told Tapia and store employee Joseph Todash that he had been chased. Perez, who was outside the store, slammed his hand on a trash can and stated "Motherfucker!" Perez then walked off in the direction of the bar. Owsley came into the store, and Deeds and Owsley engaged in a verbal exchange. Deeds was angry because he had been chased. According to Todash, Owsley was initially acting

calm but then became angry as the verbal exchange continued.² Todash saw Owsley, Tapia, and Deeds go outside and walk past the window in the direction of the bar.

A fight then ensued in front of the store, during which Deeds and Tapia were seriously injured. Prosecution witnesses described the fight as having been started by Owsley, whereas defense witnesses described the fight as having been started by Deeds.

According to Deeds, when he left the store he was "rushed by [Owsley]" and the same group of his friends that had chased him. The next thing Deeds remembered was waking up in the hospital. Tapia, whose brain was injured during the incident, had no memory of what occurred.

Amy Valentine, a customer at the store, testified that she saw Owsley hit Deeds first; Deeds responded by hitting Owsley; and then the fight ensued. Alvarado testified that after Owsley, Deeds, and Tapia walked out of the store, he saw the three males talking in front of the store. Owsley "puffed out his chest" and walked towards Deeds and Tapia. Deeds and Tapia put their hands up in a fighting stance and walked backwards. First Owsley "c[ame] at them," and then Coatsworth, Perez, and Head "rushed at" them. When Todash looked out the store window, he saw Deeds and Tapia

² The jury was shown a video from the store's surveillance camera that made an audio and visual recording of what occurred while Deeds was inside the store.

running backwards, putting their fists up in front of their faces like they were ready to fight, and Owsley, Coatsworth, and Perez "running at them," with Owsley in the lead.³

During the fight, Deeds and Tapia were knocked to the ground. After Deeds and Tapia were "knocked out cold" on the ground, the assailants "kept jumping on their chest and their head." Perez was seen kicking Deeds in the chest, and Coatsworth was seen stomping on Deeds's head and back and on Tapia's head. At one point during the fight, prosecution witnesses saw Owsley grab Coatsworth by his shirt and heard Owsley saying, "'Come on, let's go. . . . That's enough.'"

Todash called 911 when the fight started. When a sheriff's deputy arrived at the scene, Deeds was incoherent and Tapia was unconscious. Deeds was taken by ambulance and Tapia was airlifted to the hospital. Deeds suffered bruises, injuries on his chin requiring about six stitches, broken and chipped teeth, scraped knees, a black eye, head swelling, and a headache that persisted about a week to 10 days. Tapia suffered serious intracranial bleeding and a facial fracture. He underwent a craniotomy which removed a portion of his skull.

Testifying on his own behalf, Owsley denied that there was a plan to assault someone and denied that anyone chased Deeds to the store. Owsley described a verbal confrontation initiated by Deeds, followed by a fight initiated by Deeds. He stated that after Deeds hit him, he hit Deeds about four or five times and then stopped when Deeds

³ Todash did not see what transpired immediately after the three males left the store because he was waiting on a customer, and he did not know who was the initial aggressor.

fell to the ground. He acknowledged that his friends joined the fight and continued the assault even after Deeds and Tapia were on the ground, but claimed he did not ask his friends to help him, he did not condone what happened after he fought Deeds, and he tried to get his friends to leave. Aereanna Wright, a friend of Owsley's who witnessed the fight, corroborated Owsley's version of the incident. She testified that Deeds and Tapia surrounded Owsley and put their hands up as if they were ready to fight; Owsley told them he did not want to fight; Deeds hit Owsley; and Owsley responded by swinging back. Wright heard Perez whistle or hoot, and then Coatsworth, Head, and Perez arrived and joined in the fight. As the fight continued, Owsley was standing by the door to the store, and he tried to make Coatsworth stop and leave.

As to Tapia, the jury convicted Owsley of mayhem and assault by means of force likely to produce great bodily injury. As to Deeds, the jury convicted Owsley of assault by means of force likely to produce great bodily injury with a finding that he personally inflicted great bodily injury. The trial court sentenced him to six years in prison, consisting of a three-year middle term and a three-year enhancement term on the count involving Deeds, and concurrent or stayed terms on the counts involving Tapia.

DISCUSSION

Over defense objection, the trial court admitted Perez's statement "We're going to roll some fools from [the bar]" under the coconspirator exception to the hearsay rule.

To admit a declarant's statement under the coconspirator hearsay exception, there must be independent evidence that a conspiracy exists and a showing of three preliminary facts: (1) the declarant was participating in the conspiracy at the time of the declaration;

(2) the declaration was in furtherance of the objective of the conspiracy; and (3) at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy. (*People v. Hardy* (1992) 2 Cal.4th 86, 139.) The preliminary showing requirement is satisfied if the proponent of the evidence provides sufficient evidence for a reasonable trier of fact to conclude the preliminary fact is true by a preponderance of the evidence. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) On appeal, we review the trial court's evidentiary ruling under the abuse of discretion standard. (*Id.* at p. 62.)

Owsley does not dispute the record can support findings that a conspiracy existed, and that at the time of Perez's statement Perez and Owsley were participating in the conspiracy. However, he asserts the record cannot support a finding that Perez's statement to Alvarado was in furtherance of the conspiracy.

A reasonable trier of fact could conclude that, when Perez made the statement, he wanted Alvarado—a store employee and friend of Coatsworth's—to refrain from interfering in the anticipated assault. The convenience store had a window in front that permitted persons inside the store to view what was occurring outside. The store was located near the bar, and bar patrons frequently went to the store. Perez could have thought that when he and his friends engaged in an assault on a patron of the bar, they might be observed by an employee of the store, and the employee could summon the authorities. Perez made the statement to Alvarado about 45 minutes before the fight occurred and at a time when Alvarado was going to work. Thus, a trier of fact could infer that Perez knew he was speaking to someone who would be at the store during the time

of the assault. A trier of fact could reasonably conclude that Perez's statement to Alvarado was implicitly asking Alvarado to "look the other way" and ignore what would be occurring outside.

To support his contention that Perez's statement was not made to further the objective of the conspiracy, Owsley cites decisions in which the California Supreme Court found coconspirator statements were not made in furtherance of the conspiracy because the statements did not solicit help to advance the conspiracy (*People v. Roberts* (1992) 2 Cal.4th 271, 303-304) or because the statements were mere "gratuitous ramblings" about the conspiracy (*People v. Hardy, supra*, 2 Cal.4th at p. 147). Although Perez's statement did not solicit affirmative help from Alvarado to engage in the fight, a trier of fact could reasonably find the statement was soliciting help in the sense that Perez did not want Alvarado to interfere by calling the authorities. Thus, the trier of fact could find the statement was designed to further the planned assault by removing a potential source of interference. For the same reason, a trier of fact was not required to conclude the statement was a mere gratuitous rambling.

The trial court did not abuse its discretion in admitting the statement under the coconspirator exception.

DISPOSITION

The judgment is affirmed.

HALLER, J.

I CONCUR:

BENKE, Acting P. J.

I CONCUR IN THE RESULT:

HUFFMAN, J.